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SCSL in the Year 2011: Atrocity Crime Litigation Review in the Year 2011

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INTRODUCTION

¶1 The Special Court of Sierra Leone ("SCSL") was established, pursuant to Security Council Resolution 1315, as an international body in its own right charged with the mandate of prosecuting persons who bear the "[g]reatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law since the outbreak of a brutal civil war in Sierra Leone in November 1996." To date, this mandate has been fulfilled but for one trial - the Charles Taylor case.[1]

¶2 The SCSL estimates that a judgment in the Taylor case shall be delivered by February 2012. With this in mind, the United Nations Office of Internal Oversight ("OIOS") conducted an audit of the SCSL as the court prepared to transform into a Residual Special Court ("RSC"). Some of the key recommendations of the audit included that:

¶3 The SCSL registrar should establish a mechanism for ranking staff to be downsized or retained.

¶4 The SCSL registrar should ensure that consistency is achieved between staff performance and the ratings in their e-PAS reports.

¶5 Each case regarding staff retrenchment/retention should be considered carefully and be fully documented.

¶6 Aside from the completion strategy and preparations for transitioning towards an RSC, one theme appeared dominant in the SCSL: both the *Charles Taylor* and *Brima, Kamara* and *Kanu* Appeals Chambers dealt with numerous contempt issues.

¶7 One of the most significant developments at the SCSL in 2011 was the indictment of five adult male persons on a charge of contempt of court. All five were former members of the Armed Forces Revolutionary Council ("AFRC"). One of the Accused, Samuel Kargbo, aka Sammy Ragga ("Ragga"), pled guilty. Three of the five accused of contempt are convicts of the Tribunal who were serving their time in Rwanda: Alex Tamba Brima (aka "Gullit"), Ibrahim Bazzy Kamara and Santigie Borbor Kanu (aka "Five-Five"). The fifth man is a former member of the AFR known as Hassan Papa Bangura (aka "Bomblast"). All these men were charged with contempt of court for attempts to contact witnesses for the purpose of having them recant their testimony with the hope that the convictions against them might be overturned, thus contravening Rule 77 of the SCSL Rules of Procedure and Evidence.

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[1] SCSL, Prosecutor v. Charles Taylor, SCSL-03-01, http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx.

¶8 This memo provides a brief background and overview of the Court and what has been accomplished thus far. The second section gives an overview of the key sections of SCSL cases and significant developments therein. The final section of this memo briefly summarizes some of the procedural developments in the Charles Taylor case. This overview will also address the issue of contempt in court.

BACKGROUND

¶9 The cases at the SCSL can be split into four broad categories. For purposes of this memo, we shall not examine each subgroup in detail since most have already concluded or did not have any key legal developments in 2011. The cases are broadly split as follows:

- *The Prosecutor v. Fofana and Kondewa, Civil Defense Forces*[2]
- *The Prosecutor v. Charles Ghankay Taylor*
- *The Prosecutor v. Sesay, Kallon and Gbao, Revolutionary United Front*[3]
- *The Prosecutor v. Brima, Kamara and Kanu, Armed Forces Revolutionary Council*[4]

¶10 The named defendants were the key actors in the long, bloody and protracted civil war in Sierra Leone that waged from 1991 to 2000.

¶11 Most of the accused persons in this court have already been found guilty and sentenced. The case of *The Prosecutor v. Alex Tamba Brima, Ibrahim Bazzy Kamara and Santigie Borbor Kanu* concluded with the Appeal Judgment on February 22, 2008. The Appeals Chamber upheld sentences of 50 years for Brima, 45 years for Kamara, and 50 years for Kanu. These men are now currently serving out their sentences in Mpanga Prison, Nyanza, Rwanda.

¶12 In the cases of *The Prosecutor v. Foday Saybana Sankoh*,[5] *Sam Bockarie*, *Issa Hassan Sesay* and *Morris Kallon*, the defendants were indicted on March 7, 2003. Augustine Gbao was indicted on April 16, 2003. There are similarly no new developments in *Prosecutor v. Fofana and Kondewa*. In short, the CDF cases have been concluded. In many respects these prosecutions bring the RUF, AFRC and CDF cases to a close.

KEY LEGAL DEVELOPMENTS AT THE SCSL IN 2011

¶13 Only two cases at the SCSL had noteworthy developments: *The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Kanu* and *The Prosecutor v. Charles Ghankay Taylor*.

¶14 On January 10, 2011, the President dismissed a motion by the Office of the Prosecutor directing the Registrar of the Court to appoint an independent investigator to "[i]nvestigate an allegation of contempt pursuant to Rule 77(C)(iii) of the Rules of Procedure and Evidence of the Special Court of Sierra Leone ('Rules')." The Honorable Judge Kamanda—President of the SCSL—ruled that he had no authority to hear the matter, stating that the matter could not fall

[2] SCSL, Prosecutor v. Moinina Fofana and Allieu Kondewa, SCSL-04-14, http://www.sc-sl.org/CASES/Prosecutorvs FofanaandKondewaCDFCase/tabid/104/Default.aspx.
[3] SCSL, Prosecutor v. Issa Hassan Sesay, Morris Kallon, and Augustine Gbao, SCSL-04-15, http://www.sc-sl.org/CASES/ProsecutorvsSesayKallonandGbaoRUFCase/tabid/105/Default.aspx.
[4] SCSL, Prosecutor v. Alex Tamba Brima, Ibrahim Bazzy Kamara, and Santigie Borbor Kanu, SCSL-04-16, http://www.sc-sl.org/CASES/Prosecutor vsBrimaKamaraandKanuAFRCCase/tabid/106/Default.aspx.
[5] SCSL, Prosecutor v. Froday Saybana Sankoh, SCSL-03-02, http://www.sc-sl.org/CASES/FodaySankoh /tabid/187/Default.aspx.

within his jurisdiction based solely on the fact that he was the Judge President ("JP"). The JP proceeded to lay down the law as presented by Rule 77 of the Rules of the Court. He argued that Rule 77 set out in a coherent, careful and chronological order "[t]he procedure at every stage from the time the allegation is made, to the final appeal against conviction or acquittal." He further explained Rule 77(c)(i) to stipulate that the contempt matter ought to be heard by a panel of three judges. Consequently he held that the matter was improper and as such he could not entertain the Motion, which was in turn dismissed in its entirety.

¶15 The Prosecution then brought an Urgent Prosecution Motion for an Investigation into Contempt of the SCSL before the Trial Chamber II, which handed down its decision on March 18, 2011. This decision did not deal with actual contempt or whether there had been a violation of Rule 77, but rather whether an independent investigator ought to be appointed to determine if indeed there was contempt after which the necessary indictments could be issued against the necessary parties.

¶16 In order to resolve the contempt issue, the Trial Chamber had to determine if there had been interference with a witness in the Brima, Kamara and Kanu case. The Prosecution alleged that Samuel Kargbo, a former AFRC member, contacted at least one Prosecution witness (TF1-334) in an attempt to get the witness to recant his testimony in exchange for some money. The Prosecution alleged this to be in a violation of Rule 77(A) and Rule 77(B), and thus in contravention of the SCSL. It was also alleged that Hassan Papa Bangura, a former AFRC member, was involved in the scheme to commit contempt of court as well.

¶17 The key issue was whether there had in fact been interference with a witness in contravention of the Rules of the Court. The second issue was whether the alleged interference should result in denial of telephone and other similar privileges conferred on the incarcerated persons. The Trial Chamber followed a previous ruling of the ICTY in the *Brdjanin* decision, which held that "intimidation of a witness as contempt of court is a crime of conduct, which does not require proof of a result. Whether the witness was actually intimidated is immaterial; the Prosecution need only prove that the conduct in question was intended to interfere with the Tribunal's due administration of justice." Using this as their point of departure, the Trial Chamber found that there was likelihood of contempt of court. The Trial Chamber ruled that a special investigator be appointed to conduct an investigation and submit his/her findings to the Register of the Court. With regards to the second issue, the Trial Chamber held that due to insufficient evidence, telephone privileges could not be withdrawn but privileges could be closely monitored to prevent abuse, as was already being done.

¶18 In addition, the Trial Chamber ruled that despite the fact that there was no evidence of any money changing hands, the mere offer of a bribe to get a witness to recant a previous testimony constituted contempt of court and a violation of Rule 77(a)(iv).

¶19 Although the findings with regards to Bangura, Brima, Kamara, and Kanu were not disclosed, it would appear that the appointed independent counsel did find sufficient grounds to conclude there had been an attempt to bribe a witness and to recommend initiation of proceedings against the Accused and convicted persons. On June 7, 2011, the Court issued a press release that it was indicting five men for contempt borne out of interference and attempted interference with witnesses. The release stated that:

¶20 Two convicted former leaders of the Armed Forces Revolutionary Council, Ibrahim Bazzy Kamara and Santigie Borbor Kanu (AKA: "Five-Five"), were given the indictment at Rwanda's Mpanga Prison, where they are serving lengthy sentences for war crimes and crimes against humanity.

¶21 Charged with Kamara and Kanu are Hassan Papa Bangura (AKA: "Bomblast") and Samuel Kargbo (AKA "Sammy Ragga"), resident in Sierra Leone. All four are charged with two counts of attempting to bribe a witness to recant his previous testimony.

¶22 Kamara faces an additional count of disclosing the name of a protected witness, "in knowing violation of an order of a Chamber."

¶23 Another press release on July 15, 2011 stated that Samuel Kargbo had pled guilty to the charge of contravening Rule 77 of the SCSL Rules of Procedure by attempting to contact witnesses for the sole purpose of having them recant their testimony with the hope that the convictions against him might be overturned. His sentencing was held over until after the Court heard the matter on the same issue for the other four accused persons. The ruling on the matter is yet to be delivered.

A. Developments in the Charles Ghankay Taylor Case

1. Trial Chamber Decisions

¶24 On January 12, 2011, the Defense filed a motion for a stay of proceedings, to either vacate the deadline for filing the parties' final brief or alternatively, to obtain a one-month extension for filing the brief. The motion was dismissed. The Trial Chamber found that since the Prosecution did not file a response to the request or the motion, given the urgency of the request and the lack of prejudice to the Prosecution, it was appropriate to render a decision without a submission from the Prosecution.

¶25 On January 27, 2011, the Defense filed a motion to re-open its case for the purpose of seeking admission of documents (information from the government of the United States ("USG") leaked by WikiLeaks, which were published in The Guardian on December 17, 2010) on the basis that the evidence could not have been obtained and presented during its case-in-chief. Additionally, the Defense argued that the documents were of special significance and had probative value given that they raised doubt about the independence and impartiality of the Special Court's prosecution. The Trial Chamber admitted the documents in part.

¶26 The Defense argued that pursuant to Rule 92*bis*, the documents were admissible on the basis that they supported the proposition that the prosecution of Mr. Taylor was political. This proposition was supported in part by allegations that his indictment was selective, and that the information contained in the USG cables was factual—according to the United States diplomatic personnel—and not opinion-based. The Prosecution opposed the motion on the ground that the Defense failed to demonstrate the relevance of the documents. The Trial Chamber only admitted the USG cable dated March 10, 2009 and the USG cable from April 15, 2009. The remainder of the motion was dismissed.

¶27 On January 28, 2011, the Defense filed a motion for disclosure and/or investigation of the USG sources within the Trial Chamber, the Prosecution and the Registry, based on the leaked USG Cables. The Trial Chamber found that the Defense did not show any evidence that there had been interference with the independence and impartiality of the Court. Therefore, there was no basis for either disclosure or an investigation. The motion was dismissed.

¶28 The Defense requested that the identity of the source(s) be disclosed within the Trial Chamber, the Prosecution, and the Registry as to who provided the USG with the information in the cables. The Defense also requested disclosure or an investigation with regards to the nature of the sources with the USG; the possibility that the Prosecution had sought or received instructions from the USG regarding any aspect of the Taylor trial; and an explanation of the

money provided by the USG to the Prosecution, including the amount of money given and when, the purpose of the funds, their use, and who the Prosecution was accountable to in the distribution and use of the funds. The Defense argued that the USG cables and a specific newspaper article clearly indicated the desire of the USG to ensure that Mr. Taylor did not return to Liberia, and such evidence proved that there were and had been contacts between the Trial Chamber, the Prosecutor and the Registry, and agents of the USG outside the official lines of communications. According to the Defense, an investigation and/or disclosure of the identity of the sources was the only way to remove doubts about the independence and impartiality of the Tribunals.

¶29 The Prosecution opposed the motion and submitted that it should be dismissed on the basis that it was "untimely and frivolous" and it only appeared to be an attempt to delay the proceedings. The evidence of cooperation between the Prosecution and the Federal Bureau of Investigation (FBI) or the USG, without proof that the Prosecution received instructions from the USG, did not per se mean that the Prosecution lacked independence as a separate organ of the Special Court, nor that it sought or received instructions from any Government or any other source.

¶30 The Trial Chamber found that although it was of concern to the Trial Chamber that the USG may have received information from "contacts" in the Chambers, the Registry or the Prosecution, the second USG cable did not demonstrate an actual threat of interference with the independence and impartiality of the Court or any of its organs. The cables only evidenced the Court's impartiality and independence.

¶31 On March 24, 2011, the Trial Chamber decided, with confidential annexes, a motion to summarily deal with contempt and urgent interim measures. The Trial Chamber granted the motion in part. The Defense filed its "Confidential with Annexes A-C Defence Final Brief" on February 3, 2011, which was not accepted by the Trial Chamber due to its late filing. As a result, the Defense filed a "Public with Annex A and Confidential Annex B Corrigendum to Defence Final Brief (Corrigendum)." On February 14, 2011, the Chief of Prosecution contacted the Court Management Section ("CMS") to express concern that the names of seven protected witnesses were disclosed in the Public Annex A. Subsequently, the Chief of Prosecution requested the CMS take immediate action to ensure there was no longer any public access to the pages of the document. The Trial Chamber issued an interim order to CMS to re-classify Annex A of the Corrigendum as Confidential pending the Trial Chamber's decision on the Motion.

¶32 In the motion, the Prosecution argued that pursuant to article 4(B) of the Practice Direction on Filing Documents Before the Special Court for Sierra Leone, only public documents may be disseminated publicly while confidential documents retain confidentiality until they are viewed by the Trial Chamber. The dissemination of a portion of the Confidential Final Trial Brief demonstrated that the Defense Counsel acted with a reckless indifference to court orders, rules and directives. The Prosecution argued that there was reason to believe that the Defense Counsel knowingly and willfully, with indifference for court-ordered protective measures, disclosed the identity of seven protected Prosecution witnesses. It further requested to the Trial Chamber to order interim measures so that the Annex A of the Corrigendum be classified as confidential.

¶33 The Defense apologized and argued that they should not be subject to disciplinary action or contempt proceedings, as the disclosure was an "unintentional mistake." The Trial Chamber noted that even though the submissions of the Parties were filed confidentially, nothing in the decision identified protected witnesses. Therefore, the decision was filed publicly. The Trial Chamber granted the motion in part and deferred its decision on the merits of the motion until

the trial was completed. The Trial Chamber also ordered the CMS to reclassify Annex A of the Corrigendum as confidential, to notify all the persons who received Annex A that it had been re-classified as confidential, and to inform necessary individuals that they should refrain from any distribution of the document until the pertinent proceedings occurred. The Trial Chamber also dismissed any other interim measure requested by the Prosecution.

¶34 Justice Julia Sebutinde partially dissented and stated that although the Special Court had handled many allegations of contempt pursuant to Rule 77, this as the first time in its history that the Trial Chamber has been asked to summarily handle a contempt proceeding arising out of its own proceedings, rather than referring the investigation to independent counsel. Alternatively, Rule 77 lists examples of contemptuous conduct proscribed as offenses within the jurisdiction of the Special Court, rather than defining the offense of "contempt" or "offences against the administration of justice." Not every example of misconduct in the investigation or conduct of a case amounts to contempt. The Prosecutor must detail why the alleged conduct would amount to contempt. Such contempt should reach a sufficient level of seriousness. Rule 77(C) enshrines two separate standards of proof. The first standard to be applied by the Trial Chamber as a preliminary inquiry into an allegation of contempt is one of reasonable belief that a person may be in contempt of court. The second standard is one of "proof beyond reasonable doubt" that a person did commit contempt. In this case, the Prosecution would have the burden to prove the offense met the two standards. Only when the Prosecution has met this standard should the Trial Chamber proceed to summarily try the individual or entity allegedly in contempt of court. At trial, the Trial Chamber would have to satisfy beyond a reasonable doubt that Defense Counsel did in fact commit contempt, before finding him guilty as charged.

¶35 Justice Sebutinde proposed an examination of the merits of the motion. Additionally, she agreed that there was no doubt that the publication of the names of protected witnesses was a serious violation of the Trial Chamber's orders that had the potential to endanger the security of the concerned witnesses and/or their families. Justice Sebutinde also weighed the apology by the Defense and the timely action taken by the Prosecution to make the controversial information confidential in considering whether or not sanctions were instantly necessary. In Justice Sebutinde's view, the conduct could not be described as "calculated to obstruct the court's task of getting at the truth" nor "a knowing and willful interference in the administration of justice." Regarding the publication of Public Annex A, the Prosecution did not demonstrate "reason to believe" that lead Defense Counsel had committed contempt or that such action was "calculated to obstruct the court's task of getting at the truth." According to the Justice's view, there was no merit in the Prosecution's allegations of contempt or misconduct on the part of lead Defense Counsel, and thus the Justice would dismiss the motion in its entirety, save for the interim measures granted by the Trial Chamber.

CONCLUSION

¶36 Very few key legal developments occurred at the SCSL in 2011. Ground covered by the SCSL was mostly focused on issues of contempt of court matters. It would therefore appear that this is a growing concern for the SCSL and its fight against impunity. As the SCSL transforms into a Residual Special Court, it is likely that cases similar to the ones reviewed will increase and therefore expand this field of international criminal law jurisprudence.

CASES STILL PENDING AT THE SCSL

- *The Prosecutor v. Brima, Kamara, Kanu* and Bangura contempt of court case.
- The Prosecutor v. Charles Ghankay Taylor trial judgment.